Calendar No. 644

100TH CONGRESS
2d Session

SENATE

REPORT
100-325

# FACILITATING THE NATIONAL DISTRIBUTION AND UTILIZATION OF COAL

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APRIL 28, 1988.—Ordered to be printed

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Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

## REPORT

together with

## SUPPLEMENTAL VIEWS

[To accompany S. 801]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 801) to facilitate the national distribution and utilization of coal, having considered the same, reports favorably thereon with amendments to the text and recommends that the bill as amended do pass.

The amendments are as follows:

1. On page 4, line 14, strike the word "primary".

2. On page 7, line 2, after the figure "5," insert "or who proposes to construct any interstate pipeline distribution system using a transport medium other than water,".

3. On page 18, strike the heading on lines 1 and 2 and insert "APPLICATION OF STATE AND LOCAL LAW".

4. On page 18, between lines 2 and 3, insert a new section 6 as follows:

> SEC. 6. (a) Nothing in this Act shall impair the validity of or in any way preempt the applicability of a State water law to an interstate coal pipeline distribution system even if such applicability discriminates against or would have the effect of prohibiting the location, construction, operation or maintenance of such pipeline.

5. On page 18, line 3, strike "SEC. 6." and insert "(b)".



S313-26

6. On page 18, line 3, strike "With respect to any State or local law other than State water law, nothing" and insert "Nothing" in lieu thereof, and on line 5 strike "such" and insert "any" in lieu thereof.

7. On page 19, line 12, after the word "applicable" insert "State and".

8. On page 19, line 15, strike "Prior" and insert "With respect to any proposed pipeline distribution system using water as the transport medium, prior".

9. On page 23, after line 8, insert the following new sections:

SEC. 12. Section 2(c) of the Mineral Leasing Act (30 U.S.C. sec. 202) is amended to read as follows:

"(c)(1) A common carrier railroad company or any company that controls, is controlled by, or is under common control with such company (hereinafter in this subsection referred to as a 'railroad or affiliated company') may hold leases of coal deposits pursuant to this Act subject to the special conditions on (i) lease bidding in paragraph (2); (ii) lease holdings in paragraph (3); and (iii) transportation of leased coal in paragraph (4).

"(2)(A) No railroad or affiliated company shall be eligible to bid for a lease under this Act of coal deposits that are adjacent to coal deposits which (i) are in lands granted by the United States to such railroad or affiliated company or to a corporate predecessor thereof and (ii) are owned by such company (hereinafter in this paragraph referred to as 'the Federal lease') unless such company notifies the Secretary of its intention to bid by a date, established by regulation, prior to the sale of the Federal lease. Whenever such a notification has been received and a tract for the Federal lease has been delineated, the Secretary shall identify a potential mining unit containing the Federal lease (hereinafter in this paragraph referred to as 'the potential mining unit') and shall require as conditions to the right of the railroad or affiliate company to bid when and if the federal lease is offered for sale, that, prior to the sale, the railroad or affiliated company shall—

"(i) upon request, make available at reasonable cost to any potential bidder for the Federal lease any and all exploration data in the possession of the company concerning the extent and nature of the land-grant coal deposits within the potential mining unit; and

"(ii) agree that, if not the successful bidder for the Federal lease, it will offer for lease the land-grant coal deposits owned by the company in the potential mining unit on reasonable terms which are not more stringent than the lease terms (including royalty rate) required by law or regulation for Federal leases and which are mutually agreed to by the Secretary and the company: *Provided*, That whenever the Secretary identifies the potential mining unit pursuant to this subparagraph (A), he shall promptly enter into good faith negotiations with the railroad or affiliated com-

pany to establish such terms and shall not offer the Federal lease until such terms are established or he and the company mutually agree in writing that the negotiations have concluded and no agreement on terms can be reached; in which latter event, the railroad or affiliated company shall not be eligible to bid on the Federal lease: *Provided further*, That the Secretary may determine without company concurrence that no agreement on terms can be reached if, after publishing a complete statement of his final offer to the company in the Federal Register and allowing thirty days for a response, the company has failed to agree to such terms.

"(B) After notification to the Secretary pursuant to subparagraph (A), a railroad or affiliated company may bid upon the Federal lease without the conditions specified in said subparagraph where the coal deposits to be included in the Federal lease—

"(i) would be bypassed by or are required to maintain ongoing mining operations owned in whole or in part by the railroad or affiliated company and are located in the potential mining unit; or

"(ii) are within or adjacent to the permit area of a mining operation that is owned in whole or in part by the railroad or affiliated company and that is operating, and has coal committed to a purchase, prior to the date of enactment of this subsection.

"(3) Any railroad or affiliated company shall be subject to the acreage restrictions of section 27(a)(1) of this Act and, within these limitations, shall not take, hold, or control at one time, whether acquired directly from the Secretary or otherwise under this Act, lease of coal deposits adjacent to land-grant coal deposits which were granted by the United States to such railroad or affiliated company or to a corporate predecessor thereof and are owned by such company in an aggregate of more than twenty-three thousand and forty acres.

"(4)(A) Whenever a railroad or affiliated company obtains a lease under this Act of coal deposits situated within the exclusive service area of such railroad company, the railroad company may not thereafter enter into contract to transport coal produced from said lease or from a mining unit that includes said lease (hereinafter in this paragraph referred to as 'the Contract') except as provided in this paragraph.

"(B) In addition to any filing which may be required by any other provision of law, the railroad company shall submit the Contract to the Secretary, together with copies of any formal transportation bid notice or request from the purchaser of the coal to be transported pursuant to the Contract (hereinafter in this paragraph referred to as 'the purchaser') to which the railroad company responded and all formal transportation bids submitted by the railroad company in response to such notice or request. The rail-

road or affiliated company shall also submit to the Secretary its supply contract with the purchaser. Within five days of submission of the Contract, the Secretary shall publish in the Federal Register notice of such submission, including identification of the contracting parties, the affected lease, and the lessee. The Contract shall not become effective until thirty days after the date of such publication.

"(C) Within that same thirty-day period, any coal producer (hereinafter in this paragraph referred to as 'the complainant') may file a complaint with the Secretary alleging that the Contract is in violation of law and that it prevented complainant from selling its coal to the purchaser in lieu of the coal to be transported pursuant to the Contract. The complainant shall submit with its complaint a copy of its coal supply bid to the purchaser and any other information necessary for the Secretary to make the disclosure determination provided for in this subparagraph. If the Secretary determines that (i) the purchaser requested and received a timely and responsive supply bid from the complainant, the terms of which were substantially similar to those of the supply contract, (ii) the complainant had no reasonable alternative transportation available for its coal except that supplied in whole or in part by the railroad company, (iii) the purchaser requested a bid from the railroad company to transport in whole or in part the complainant's coal, and (iv) the Contract and the bids, submitted by the railroad company to transport the complainant's coal are not identical in all material respects, the Secretary shall disclose the submissions of the railroad or affiliated company to the complainant and the submissions of the complaintant to the railroad company (and to its affiliated company, if the latter holds the lease to the coal to be transported pursuant to the Contract).

"(D) The submissions to the Secretary pursuant to this paragraph shall be disclosed by him only pursuant to subparagraph (C) and, except as provided in subparagraph (E), shall otherwise remain proprietary and not be released to any other person or entity, any other provision of law notwithstanding.

"(E) The complainant may make use of the submissions of the railroad or affiliated company solely for the purpose of determining whether a cause of action may exist against the railroad or affiliated company may make use of and disclose the submissions of the complainant solely for the purpose of defending such cause of action. No other disclosure or use may be made of such submissions.

"(5) In the case of a rail carrier contract for the transportation of coal mined in whole or in part from a coal deposit that is (a) under lease pursuant to this subsection to the railroad company operating such rail carrier or to an affiliated company and (b) situated within the rail carrier's exclusive service area, a complaint may be filed with the Interstate Commerce Commission by a coal producer or

coal shipper on the grounds that such producer or shipper individually will be harmed because—

"(i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such producer or shipper for rates and services for the transportation of coal under similar conditions to the contract at issue, and that the producer or shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

"(ii) the proposed contract constitutes a destructive competitive practice under the Interstate Commerce Act.

Such complaint shall be treated as a complaint of unreasonable discrimination under Section 10713(d)(2)(B) of the Interstate Commerce Act (49 U.S.C. 10713(d)(2)(B)).".

SEC. 13. The provisions of section 27(d) of the Mineral Leasing Act (30 U.S.C. sec. 184) applies to any holder of a Federal coal lease including, but not limited to, a railroad or affiliated company as defined in section 2(c)(1) of the Mineral Leasing Act as amended by this Act.

## I. PURPOSE OF THE MEASURE

The purpose of the measure as reported by the Committee on Energy and Natural Resources, is to facilitate the development of interstate coal pipeline distribution systems, subject to the primacy of State water law. This is accomplished by granting the Federal power of eminent domain to those interstate coal pipeline distribution systems that are determined by the Secretary of Energy to be in the national interest based on certain statutory findings, while ensuring, through the delegation of Congressional power under the Commerce Clause, primacy of State law and procedure regarding water used in interstate coal pipeline distribution systems.

In addition, the measure as reported by the Committee modifies section 2(c) of the Mineral Leasing Act to permit railroads or their affiliated coal mining companies to obtain Federal coal leases. Railroads or their affiliates wishing to lease Federal coal within the railroad's land grant area must meet certain specified conditions.

## II. SUMMARY OF MAJOR PROVISIONS

The major provisions of S. 801, the Coal Distribution and Utilization Act of 1987, as reported are summarized as follows:

(1) *Determination of National Interest.*—Eminent domain authority would be granted on a case-by-case basis only to coal slurry pipelines determined to be in the national interest where the applicant has secured approval of any necessary water permit or authorization for the use of water. The Secretary of Energy is to determine whether construction of the particular coal slurry pipeline is in the "national interest" considering the following criteria: (a) ability to meet needs for national coal distribution and utilization; (b) competition enhancement and new market outlets; (c) contribu-

tion to national security; (d) economic benefits; and (e) effect on environment compared to environmental impacts of alternatives.

(2) *Small and Independent Coal Producer Access.*—The applicant for construction is required to make available to small and independent producers the lesser of 10 percent of pipeline capacity or that portion of capacity to satisfy demand of all small and independent producers in the region served by the pipeline.

(3) *Antitrust Review.*—The Department of Justice is to conduct an antitrust review of the application for a national interest determination regarding construction of the pipeline.

(4) *Eminent Domain Authority.*—The bill grants Federal eminent domain authority to obtain rights-of-way for coal slurry pipelines determined to be in the national interest subsequent to good faith efforts by the pipeline developer to acquire the rights-of-way through negotiation.

(5) *Historic, Wildlife, and Conservation Areas.*—Unless there is no "feasible and prudent alternative," no right-of-way may be acquired through the exercise of eminent domain through lands of historic significance or lands held primarily for wildlife refuge, sanctuary, recreational, or natural resource conservation purposes.

(6) *Payment for Federal Coal.*—The Secretary of the Interior is to determine the decrease in value of Federal coal affected by construction of the pipeline so that the applicant can compensate the United States.

(7) *Primacy of State Water Law.*—Congress expressly delegates to the States the power to regulate the use or export of water in any interstate coal slurry pipeline system notwithstanding any adverse impact this may have on interstate commerce or on any interstate coal pipeline distribution system. State water law will have primacy. However, other State laws cannot discriminate against coal slurry pipeline systems.

(8) *Underground Construction.*—The coal slurry pipelines are to be, to the maximum extent practicable, located underground.

(9) *Jurisdiction of State Public Utility Commissions.*—State public utility commissions are to have continuing ratemaking authority over the costs related to construction, operation, and maintenance of any coal slurry pipeline distribution system.

(10) *Environmental Laws.*—Pipeline systems will be subject to Federal Water Pollution Control Act ("FWPCA") and other applicable State and Federal environmental provisions. With respect to coal pipeline distribution systems using water as the transport medium, the Secretary cannot issue any finding relating to whether the pipeline is in the "national interest" until the Administrator of the Environmental Protection Agency advises the Secretary that the applicant can reasonably be expected to comply with FWPCA requirements.

(11) *Filing of Transportation Contracts.*—Shippers and prospective pipeline carriers must file contracts for the transportation of coal with the Federal Energy Regulatory Commission. Shippers have the right to file a complaint with the FERC if access to the pipeline is unfairly denied.

(12) *Railroad Leasing of Federal Coal.*—The prohibition on the leasing of Federal coal by railroads and their affiliates, contained in the Mineral Leasing Act, is repealed. However, in order to lease

within a railroad's land grant area, a railroad and its affiliates must meet certain conditions relating to cooperative leasing, data disclosure, and filing of coal supply and transportation contracts.

## III. Background and Need

### UNITED STATES COAL RESOURCES AND COAL TRANSPORTATION

The United States has the largest coal reserves in the world, accounting for 35 percent of total world proved recoverable reserves. The U.S. Geological Survey estimates that the United States has 1.7 trillion tons of identified coal resources. Coal production in the United States reached 917 million short tons in 1987, and is projected to increase 16.5 percent during the next eight years, reaching 1.068 billion short tons in 1995.

There is a growing recognition that the increased use of coal is an important factor in moving this Nation toward energy self-sufficiency. During 1986, coal accounted for nearly 56 percent of total generation by domestic electric utilities, and accounted for a 78 percent share of total fossil fuel consumption at electric utilities. Coal's share of total U.S. energy consumption increased from 18 to 23 percent over the past 10 years. This evidences a gradual trend toward increasing reliance on coal to meet the Nation's energy needs.

Railroads currently are the primary method of transporting U.S. coal. About 60 percent of coal produced nationwide is hauled by rail. In the Powder River Basin, railroads ship more than 90 percent of the coal.

The cost of coal transportation affects the marketability of U.S. coal. According to a report issued by the National Coal Council ("Improving International Competitiveness of U.S. Coal and Coal Technologies," June 1987), the total cost of transporting export coal is the most significant factor affecting international competitiveness of the U.S. coal industry.

The United States is losing its world market share of coal exports, with the U.S. export share projected to fall to 13.8 percent in 1990 from 16 percent in 1984. In 1984, Australia replaced the United States as the leading coal export nation.

In addition, some utilities in the United States have started to import coal, finding it more cost-effective to purchase coal from countries such as Colombia, Australia, and Canada than to pay the price for delivered domestic coal. The Energy Information Administration (EIA) estimates that the United States will import a total of 4.8 million tons of foreign coal in 1995, up from 2 million tons in 1985. This will results in an overall loss to the economy of approximately 1,500 jobs and $389 million in business revenue.

A substantial amount of all rail coal tonnage in captive, *i.e.,* one rail carrier provides the only means for transporting coal from the mine to market. Rail transportation costs comprise a significant portion of the delivered price of coal, accounting for as much as 35 to 50 percent, and in some instances more, of the total delivered price.

Experience demonstrates that competition results in lower rail rates for coal. In 1984, a second rail carrier began service in the southern part of the Powder River Basin, providing origin service

competition at mines that had previously been serviced by only one carrier. According to a report by the Bureau of Land Management ("Case Study: Impact of Coal Transportation on Western Coal Development and the Federal Coal Program," Bureau of Land Management, May 19, 1987), railroad rates for handling coal in the region "fell substantially" following entry of the second rail carrier, with rate decreases as high as $7 per ton and savings to consumers estimated at over $160 million.

Similarly, the existence or proposed construction of coal slurry pipelines has resulted in reduced rail rates. The Eastlake coal slurry pipeline in Ohio resulted in consistently declining rail rates during its operation from 1957 to 1963. Prospective competition from a proposed 1,378-mile pipeline, proposed by Energy Transportation Systems, Inc. (ETSI) resulted in lower rail haulage rates for a purchasing utility.

Analysis contained in a 1985 EIA report ("Coal Slurry Pipelines: Impact on Coal Markets," DOE/EIA-0468, April 1985) indicates that 1995 estimated coal pipeline rates would be anywhere from $12 to $20 per ton less than estimated 1995 railroad rates.

Coal slurry pipelines represent an additional mode of transportation which promises to be environmentally sound and economically feasible. If coal can be transported by coal slurry pipelines more cheaply than by railroads, coal could become more attractive to domestic users. The development of coal slurry pipelines could potentially reduce our dependence on foreign oil and natural gas. In addition, coal slurry pipelines could increase the United States share of the international coal market by augmenting the coal industry's capacity to deliver coal for export.

### COAL SLURRY PIPELINES

Coal slurries are a mixture of pulverized coal with water, or in some instances with another medium such as liquid carbon dioxide, methanol or fuel oil. The ratio of coal to water is usually 50–50, with a higher percentage of coal to transport medium possible when a medium other than water is used.

The coal slurry is transported by pipeline at a rate of 3 to 5 miles per hour, with pump stations every 50 to 150 miles along the pipeline. When necessary, the slurry is dewatered upon reaching its destination. In addition, some companies are now marketing a technology for the direct combustion of finely-ground coal-water slurries, which can contain a higher percentage of coal to water (75 pecent coal to 25 percent water).

The technical and economic feasibility of coal slurry pipelines in the United States has been demonstrated in two projects. The first coal slurry pipeline was developed in Ohio in 1957. The 10-inch diameter pipeline, built to offset high coal rates, ran 108 miles from Cadiz, in southeastern Ohio, to Eastlake, in suburban Cleveland. This line operated for 6 years with a capacity of 1.3 million tons of coal per year.

Southern Pacific Railroad Company constructed a second coal slurry pipeline, the 273-mile-long Black Mesa pipeline, which began operation in 1970 and continues to operate today. That 18-inch di-

ameter pipeline, which transports 4.8 million tons of coal per year, reaches from northeastern Arizona to the southern tip of Nevada.

A 162-mile coal slurry pipeline is being constructed in the U.S.S.R. Coal Slurry pipelines already exist in the U.S.S.R., France and Poland. Discussions have been held regarding construction of pipelines in the U.S.S.R. covering 1,500 to 2,500 miles.

Since 1973, a total of 11 new coal slurry pipeline projects have been proposed for construction in the United States. However, all of the projects are either on hold or have been terminated due to difficulties in implementation.

One of these proposed pipeline projects was the ETSI pipeline, which was planned to transport 25 million tons of coal annually from Wyoming to Arkansas and Louisiana. However, this project was canceled in 1984 after project promoters had brought over sixty legal actions in an effort to obtain rights-of-way for the pipeline. The delay caused by lengthy litigation has increased the cost of the project from $800 million to approximately $3.5 billion.

The necessity of obtaining rights-of-way across public and private lands, including railroad lands, poses a significant obstacle to construction of coal slurry pipelines. According to an Energy Information Administration report ("Coal Slurry Pipelines: Impact on Coal Markets," DOE/EIA–0468, April 1985), railroad operators have refused to negotiate rights-of-way across their land because they consider coal slurry pipelines unnecessary, undersirable competitors. S. 801 would address this problem by granting the power of Federal eminent domain to acquire rights-of-way for pipelines determined to be in the national interest.

### FEDERAL POWER OF EMINENT DOMAIN

In the 1860's and 1970's the land grant railroads obtained Federal eminent domain authority in order to foster the expansion of the West. The principal precedent for the granting of the power of eminent domain is that granted to natural gas pipelines by the 1947 amendment of the Natural Gas Act (15 U.S.C. 717f(h)). Oil pipelines were authorized to use the Federal power of eminent domain during World War II under the war powers of the Cole Act. Federal Power Commission licensees for hydroelectric projects can also use eminent domain. Eminent domain authority was similarly extended to electric transmission lines.

Coal pipelines, like gas and oil pipelines, and the railroads, represent means of long-distance transportation. Thus, granting coal pipelines the right of Federal eminent domain authority would be consistent with the authority which has been extended to these other forms of transportation in preceding years.

The importance of granting interstate pipelines Federal eminent domain authority is further borne out by the inconsistencies in State laws governing eminent domain authority for coal slurry pipelines. Several States are subject to statutes which prohibit them from granting eminent domain authority to such projects unless the pipelines are of public use and benefit to the people of the State. This criterion is virtually impossible to meet in those States which are traversed by pipeline but are not the repository of its coal and so not served by the pipeline.

Granting Federal eminent domain authority to coal slurry pipelines will facilitate the development of this new and progressive mode of transportation. Competition in the transportation of coal will help ensure increased efficiency and lower prices to consumers of coal. This new technology, given the opportunity to compete, will help our nation in its goal to utilize its vast coal reserves and to become a more effective competitor on the world market.

### APPLICATION OF STATE WATER LAW

In this Congress, as in previous Congresses, the application of State water law was a major focus of Committee concern. Perhaps no element of the development of interstate coal pipeline distribution systems has been as controversial as the potential impact of such development on scarce Western water supplies and the right of States to allocate water within their boundaries.

Some States have in the past expressed concerns regarding the validity and application of State water laws in the State of origin of water supplies. In addition, States which are not the origin of water supplies, but share in the water supplies, particularly groundwater supplies, or are within the same river-basin, have become increasingly concerned regarding the protection of their interests should any water be diverted for use in an interstate coal pipeline distribution system.

The concerns have been heightened by recent court decisions. Because of these concerns, the bill provides for the primacy of State water law and procedures regarding water used in interstate coal pipeline distribution systems including those granted the right of eminent domain under this Act.

The Committee report accompanying S. 267, S. Rep. No. 98-61, 98th Cong., 1st Sess. 20-25 (1983), contains a lengthy discussion of the consideration given the water law provisions of that measure. Since the provisions of this measure are virtually identical, that discussion and expression of Committee intent is hereby incorporated in this report by reference and are printed as Appendix A.

### SECTION 2(C) OF THE MINERAL LEASING ACT

Section 2(c) of the Mineral Leasing Act currently prohibits the leasing of Federal coal by railroads and their affiliates. That section provides that:

> No company or corporation operating a common carrier railroad shall be given or hold a permit or lease under the provisions [of the Mineral Leasing Act] * * * for any coal deposits except for its own use for * * * railroad purposes.

When section 2(c) was enacted 68 years ago, the railroads were viewed as the most powerful segment of the American economy. They were particularly powerful in the West, where they produced coal for their locomotives and there were few other coal producers. Congress was fearful that allowing the railroads to mine Federal coal for commercial sale as well as to transport it might result in railroad dominance over public land coal development. The Department of Justice has taken the position that section 2(c) applies to independent coal companies affiliated with a common carrier rail-

road, as distinguished from the railroad itself. The Department of the Interior had held a longstanding position to the contrary, based on a series of Solicitors' opinions issued during the 1970's. But in 1982, the Solicitor revisited that position and, acquiescing in the Justice Department's view, chose to suspend any further leasing to railroad coal affiliates. Despite this interpretation, both Departments nevertheless continue to advocate repeal of section 2(c).

At the time that section 2(c) was enacted, and indeed to the present, there were those who believed that there might be collusion between the railroad and its affiliate, who feared railroad dominance and misuse of this dominance, and who maintained that the extensive land holdings by certain railroads as a result of Federal land grants provided the railroads with a competitive advantage, in both leasing and transportation, over other coal companies.

Through the years there have been many recommendations that section 2(c) be repealed. Repeal has been the official position of the last seven Administrations. As early as 1970, the Public Land Law Review Commission in its report to Congress and the President stated that fears of monopolistic control which led to the enactment of section 2(c) were no longer appropriate and recommended its outright repeal. The Justice Department's Antitrust Division later concluded in its 1980 report entitled "Competition in the Coal Industry" that section 2(c) was no longer necessary. That report also stated that section 2(c) is anti-competitive. According to the report, by prohibiting coal companies affiliated with railroads from bidding for federal coal leases, section 2(c) detracts from rather than protects competition.

In 1984, the Linowes Commission concluded:

> Repeal of Section 2(c) would "unlock" the Federal tracts within the railroad checkerboards that the railroads have not been willing to lease or make available through other arrangements such as joint ventures. The opening of checkerboard areas for greater development would add further potential sources of coal supply, increasing competition and helping to ensure that coal consumers obtain the lowest coal prices possible.

("Fair Market Value Policy for Federal Coal Leasing," (February 1984), at 525–526.)

However, in order to "avoid railroad dominance of checkerboard coal development," the Linowes Commission recommended that repeal of section 2(c) be linked with measures, such as cooperative leasing, to ensure equal access by all coal companies to coal in checkerboard areas. In addition, the Commission concluded that greater competition in the transportation of Federal coal was desirable, and those Commissioners participating on the issue recommended that Congress enact legislation giving eminent domain authority to coal slurry pipelines in order to promote such competition.

Additionally, in some circumstances the on-the-ground effect of the prohibition imposed by section 2(c) is to frustrate the most efficient and environmentally sound mining of intermingled federal, railroad, state and other non-federally owned coal located in the

extensive so-called checkerboard railroad land grant areas of the West.

Thus, it is the view of the Committee that conditional repeal of section 2(c) will enhance—not detract from—competition, and will help to ensure a ready supply of important coal resources for our nation.

## IV. Legislative History

On March 19, 1987, Senator Johnston introduced S. 801, the Coal Distribution and Utilization Act of 1987. The measure is co-sponsored by Senators Bradley, Breaux, Bumpers, DeConcini, McCain, McClure, Matsunaga, Murkowski, Nickles, Stevens, Boren, Inouye, Garn, Cochran, Simpson, Wilson, and Gramm.

In previous Congresses, similar bills have been introduced in the Senate and the House of Representatives. None was enacted into law. In the 93rd Congress, the Senate Committee on Interior and Insular Affairs favorably reported S. 2879, which passed the Senate by voice vote. During the 97th and 98th Congress, the Senate Committee on Energy and Natural Resources reported favorably S. 1844 and S. 267, respectively, measures similar to S. 801.

Following introduction of S. 801, the full Committee held hearings on September 10, 1987. Similar legislation, H.R. 1531, is pending before the House Committee on Interior and Insular Affairs and the House Committee on Public Works and Transportation.

## V. Committee Recommendation and Tabluation of Votes

The Committee on Energy and Natural Resources, in open business session on April 13, 1988, by a majority vote of a quorum present recommends that the Senate pass S. 801, if amended as described herein.

The rollcall vote on reporting the measure was 10 yeas, 6 nays as follows:

| YEAS | NAYS |
|---|---|
| Mr. Johnston | Mr. Ford |
| Mr. Bingaman | Mr. Metzenbaum* |
| Mr. McClure | Mr. Melcher |
| Mr. Weicker* | Mr. Wirth* |
| Mr. Domenici | Mr. Fowler |
| Mr. Wallop | Mr. Conrad |
| Mr. Murkowski | |
| Mr. Nickles | |
| Mr. Hecht* | |
| Mr. Evans | |

*Indicates voted by proxy.

## VI. Committee Amendments

*Amendment 1.*—Section 3(2) of the bill was amended to clarify that the distribution of coal, and not the distribution of water, is the economic purpose of an interstate coal pipeline distribution system.

The change was made with the recognition that water used to mix with coal will in many instances necessarily be an end-product

of the pipeline system, but in no event may a purpose for construction of an interstate coal pipeline distribution system be the transportation or distribution of water. If a pipeline is not economic without the distribution of water, it would not qualify for the eminent domain authority under this measure. Also, water distribution systems intended to deliver water for uses other than the coal slurry pipeline system, would not be included as part of the interstate coal pipeline distribution system or be eligible for the eminent domain authorities under this measure. The Committee notes that most States have statutes providing State eminent domain for such water distribution systems which may be utilized. If, however, water is used at the end of the system as an incidental result of it being available, the eminent domain authorities of this measure would be available assuming the pipeline system otherwise qualifies.

*Amendment 2.*—The amendment conforms the bill language to address situations where coal slurry pipelines use transport media other than water. Section 4(a) was amended to provide that persons proposing to construct coal slurry pipelines using transport media other than water need not secure approval of a water permit or other appropriate authorization for use of water prior to applying for approval of the pipeline.

*Amendment 3.*—The amendment is a clerical correction to conform the heading of section 6 to the amended text of the section.

*Amendment 4.*—The amendment adds a new subsection 6(a), which provides that the validity of the State water law where water is sought to be acquired for use or export in any interstate coal pipeline distribution system will not be impaired or preempted in any way by this measure, even if such laws prohibit or discriminate against such system.

*Amendment 5.*—The amendment is a clerical change to redesignate the unamended text in section 6 as subsection (b).

*Amendment 6.*—The amendment is a clerical correction to delete unnecessary langauge.

*Amendment 7.*—The amendment clarifies the intent that interstate coal pipeline distribution systems authorized under the legislation must comply with applicable State, as well as Federal, environmental control laws.

*Amendment 8.*—The amendment conforms bill language to address situations where coal slurry pipelines use transport media other than water. Section 10 is amended to apply only to coal slurry pipelines using water as, or as a portion of, the transport medium.

*Amendment 9.*—The amendment addes a new section 12 to the bill which modifies section 2(c) of the Mineral Leasing Act to permit railroads or their affiliated coal mining companies to obtain federal coal leases under certain specified conditions. The amendment would repeal section 2(c) unconditionally outside of a railroad's land grant area, but, with certain exceptions, would subject any railroad or railroad-affiliated company wishing to bid on a federal coal lease in its land grant area to the following requirements:

1. *Cooperative Leasing.*—A railroad or its affiliate seeking to lease federal coal within the land grant area of the railroad, its affiliated company, or corporate predecessor, must automati-

cally lease the railroad's land grant coal deposits adjacent to the federal tract, in the same "potential mining unit", as determined by the Secretary of the Interior, to the winning bidder in the lease sale on reasonable terms mutually agreed to by the Secretary of the Interior and the company;

2. *Data Disclosure.*—A railroad or its affiliate must disclose at "reasonable cost" all the exploration data is possesses concerning the nature and extent of the land grant coal deposits within the "potential mining unit";

3. *Acreage Limitation.*—Railroads and their railroad-affiliated coal companies are subject to a limitation of the acreage of Federal leases they may adjacent to the railroad's land-grant coal deposits; and

4. *Disclosure of Coal Supply and Transportation Contracts.*—The railroad or affiliated coal company must submit to the Secretary of the Interior its supply contract, transportation contract, and other bids for hauling competitors' coal prior to shipping from any "exclusive service area." The Secretary must disclose the contract and bids to a complaining competitor when the railroad's contract to haul its affiliate's coal and the railroad's bid to haul the competitors coal are not "identical in all material respects.

The amendment also provides that a coal producer or shipper may file a complaint with the Interstate Commerce Commission under certain circumstances.

The amendment adds a new section 13 to the bill which clarifies that section 7(k) of the Mineral Leasing Act, relating to unlawful trusts, applies to any holder of a federal coal lease, including a railroad or affiliated company.

## VII. Section-by-Section Analysis

Section 1 sets forth the short title.

Section 2 sets forth the findings and purpose of the bill which is to facilitiate the development of interstate coal pipeline distribution systems by granting the Federal power of eminent domain to those systems that are determined to be in the national interest. Any such development shall be subject to State water law, interstate compact, and laws governing the interstate allocation of water.

The Congressional policy set forth in the findings articulates that State water laws are a reasonable and permissible means for the protection of resources of a State based on the Committee's view that the States are the best arbiters of decisions relating to their water resources. The policy also states that state water law and interstate compacts are a carefully balanced system for the allocation of water, that interstate coal pipeline distribution systems must be developed within the context of that system even if a burden on interstate commerce might result, and that the need to develop coal pipelines is subservient to the national interest in the primacy of State water law and interstate compacts concerning water allocation.

In addition, the findings in sections 2(a) (9) and (10) indicate the express intent of the Congress that its authority under the Com-

merce Clause be delegated to the States in order to establish the primacy of State law over water used for any interstate coal pipeline distribution system. This delegation is effective as to all State water laws, both existing and prospective, including anti-export and reciprocity statutes, as applied to interstate coal pipeline distribution systems.

Section 3 sets forth definitions. "Interstate coal pipeline distribution system" is defined as having its economic purpose to be the distribution of coal in a liquid or solid state. The definition of "State water law" is not intended to be exhaustive. It includes at a minimum both existing and future substantive and procedural statutory law, State constitutional provisions, judicial decisions and administrative law. The definition clarifies that State water laws which might otherwise be invalid in the absence of this legislation due to improper regulations of interstate commerce, are not to be deemed invalid insofar as they apply to any interstate coal pipeline system. The Committee intends that this definition include the entire body of State law, of the State granting or denying the water right, which must be complied with by an interstate coal pipeline distribution system to obtain rights to use or export water for the system. The definition includes the water law of the State or States granting the rights to the primary supply of water for the pipeline and the State or States which may grant rights to supplementary water supplies. It is intended to encompass all State substantive and procedural water laws which apply in the acquisition of water rights. It is important to note that this definition does not broaden the scope of this bill beyond those situations in which water is used in an interstate coal pipeline distribution system. This definition, read in conjunction with Section 5, makes it clear that this bill affects the validity of State water law only as applied to interstate coal pipeline distribution systems. It is not intended to include the water laws of States through which the pipeline and the water/coal mixture may merely be transmitted.

Section 4 sets forth procedures for granting and acquiring the Federal power of eminent domain. Subsection (a) requires the Secretary of Energy to determine whether the construction of the proposed interstate coal pipeline system would be in the national interest. Prior to a determination, the applicant must file and secure approval of any necessary water permit or other necessary authorization relating to water. The intent of the remaining provisions of the section is self-explanatory.

Section 4(b) requires the Secretary of Energy to make findings on five specified criteria as a basis for determining whether the pipeline is in the national interest. The criteria include meeting national needs for coal distribution and utilization, competition, national security, economic benefits, and the environment.

Section 4(c) sets aside a portion of the capacity of the pipeline for small and independent producers, defined as those who produce 200,000 tons of coal or less, and are not affiliated with other companies.

Section 4(d) provides for procedures and time limitations on proceedings required for the Secretary to make a national interest determination.

Section 4(e) requires the Attorney General to conduct an antitrust review to determine the likely effects upon competition of approval of the application of an interstate coal pipeline system. No application may be determined to be in the national interest if the application is not consistent with the antitrust laws.

Section 4(f) authorizes the use of Federal eminent domain power to those persons whose applications for constructing an interstate coal pipeline system have been determined to be in the national interest. Nothing in the section is to be construed to permit any person to acquire any water right through the exercise of the power of eminent domain granted under the Act. This provision imposes certain limitations on rights-of-way that may be acquired by exercising the power of eminent domain. The intent of the remaining provisions of the section is self-explanatory.

Section 4(g) permits the applicant to amend its application to request a right-of-way over any alternative route. The Secretary may also require the relocation of any right-of-way under certain circumstances.

Section 4(h) requires the Secretary of the Interior to evaluate the effects of a proposed interstate coal pipeline system upon the ability of the United States to recover the value of certain affected mineral interests. The Secretary shall require the applicant to pay the fair market value of coal precluded from being recovered and the reduction in fair market value of coal which will be more difficult to recover as a result of the proposed right-of-way.

Section 4(i) requires the Secretary of Energy to promulgate rules and regulations necessary to exercise the authority provided for in this section.

The intent of section 4(j) is self-explanatory.

Section 5(a) expressly prohibits any person, legal entity or governmental entity (including the United States and States or local governmental bodies) from controlling, reserving, appropriating, purchasing, transferring, using, diverting, dedicating, disposing of, distributing, acquiring, exercising, exporting or claiming water or any right or interest therein, for export or use within or outside the State granting or denying such export or use in an interstate coal pipeline distribution system, unless such export or use take place pursuant to the substantive and procedural State water law of such State; including laws regarding the protection and enforcement of water rights. State water law is to be enforced even if it means that an interstate coal pipeline distribution system could not be constructed, and even if it results in uneven and disparate effects on interstate commerce. The Committee does not intend to create any implication regarding the primacy of State water law in other areas by its silence.

This language is intended to mean the State water law of the State where the diversion takes place, not where the water resource originates, unless they are one and the same. Nothing in this Act is intended to change the relative rights, if any, between States to shared water resources.

The provisions of section 5(a) are equally applicable to the use or export of unappropriated or diverted water in the first instance, as they are to a change in use of an existing water right for use in an interstate coal pipeline distribution system. This subsection ex-

pressly provides for the ability of a State to deny the right to use or export water for an interstate coal pipeline distribution system.

Section 5(b) is a clear and express statement of the intent and policy of Congress, acting in recognition of and pursuant to its Commerce Clause powers, to delegate to the State the power to regulate the export or use of water in any coal slurry pipeline distribution system, through State water laws, in a manner which might otherwise not be permissible. This delegation expressly includes, but is not limited to, the provisions of State water law which provide for the establishment or exercise of terms or conditions on permit or authorizations for, interests in, or rights to control, reservation, appropriation, purchase, transfer, use, diversion, dedication, disposal, distribution, acquisition, exercise, export or claim of water for the export or use in any interstate pipeline distribution system, notwithstanding any adverse impact such delegation may have on interstate commerce or any interstate pipeline distribution system.

The States are authorized by virtue of this section to deny the acquisition or exercise of a water right and to impose restrictions on water use, including terms and conditions terminating use, on any interstate coal pipeline which may be unilateral impositions of otherwise unreasonable burdens on commerce. Such State law is intended to be insulated from attack under the Commerce Clause. The Committee intends this section to be construed broadly.

The delegation of authority to the states under this subsection is strictly limited to the regulation of the use or export of water in any interstate coal pipeline distribution system. The Committee intends that this legislation have no affect on this existing authority of States to regulate the use or export of water for purposes other than interstate coal pipeline distribution systems. The Committee does not intend to affect the decision or underlying rationale of *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982), except in the limited instance of any interstate coal pipeline distribution system.

Section 5(c) provides that this Act shall not impair the validity of or preempt any provision of State water law or of an interstate compact governing the use of water, alter any State's share of surface or ground water as determined by past or future interstate impacts, legislative action or judicial decisions, or preempt any State or Federal law or interstate compact dealing with water quality or disposal. The Committee does not intend to alter the share of water of any interstate watercourse or aquifer to which any State may be entitled or to which any State may be limited by law governing the allocation between States of the waters of an interstate watercourse or aquifer. Subsection (c) also states that this Act does not confer any ability to exercise any Federal water right, nor does it affect rights of any Indian or Indian tribe.

Section 5(d) prohibits any interstate coal pipeline from using water to which a Federal right can be asserted, unless such use is authorized pursuant to State water law.

Section 6(a) provides that nothing in this measure shall impair the validity of or preempt in any way the applicability of State water law to interstate coal pipeline distribution systems even if such law prohibits or discriminates against the location, construction, operation, or maintenance of such pipelines.

This section does not limit the primacy of State water law under section 5 or the requirements in section 4(a)(1) for State water permits as a condition precedent to an application.

Section 6(b) provides that State and local laws and regulations are not preempted by S. 801, unless such laws discriminate against interstate coal pipeline distribution systems. This provision again attempts to strike a balance between: (a) the desirability of maintaining State control over facility siting, environmental impacts, and public health and safety matters; and (b) the necessity for insuring that the Federal intent not be frustrated through application of laws which discriminate against interstate coal pipeline distribution systems. This subsection should be contrasted with subsection 6(a) which provides that State water law will not be impaired or preempted in any way. The exception in subsection 6(b) provides for application of State laws pertaining to the location, construction, operation or maintenance of interstate coal pipelines even if such application would prohibit the building of such pipelines provided that such application or such State law is not discriminatory.

Section 7 requires underground construction, to the maximum extent practicable, of interstate coal pipeline systems. This section also requires the replacement of topsoil in disturbed areas.

Section 8 makes clear that nothing in this measure requires any forms of automatic passthrough of, or preempts the ratemaking authority of any State utility regulatory agency or the Federal Energy Regulatory Commission with respect to costs associated with the interstate coal pipeline system.

Section 9 provides that interstate coal pipeline systems authorized by this bill are subject to the requirements of the Federal Water Pollution Control Act, as amended, and other applicable State and Federal environmental control laws.

Section 10 requires, with respect to any proposed coal pipeline distribution system using water as the transport medium, the Administrator of the Environmental Protection Agency to conduct a review of the ability of any interstate coal pipeline system to comply with Federal water discharge requirements. The Secretary shall not make findings pursuant to section 4 unless the Administrator reasonably expects that the water discharge from the proposed system can meet the requirements of the Federal Water Pollution Control Act.

Section 11(a) provides that any person who proposes to operate an interstate coal pipeline system, and files with the Federal Energy Regulatory Commission a contract between a prospective shipper and a pipeline carrier within ten business days of signing the contract, may enter into contracts with one or more shippers of coal to provide transportation under specified rates, terms and conditions, but may not unreasonably discriminate against other shippers.

Section 11(b) provides that in cases where the pipeline operator files a contract under this section for the transportation of a volume of coal which is less than the total pipeline capacity the operator shall enter into subsequent contracts with shippers in the chronological order in which written offers are submitted, provided the shipper is "ready, fit, willing, and able". This section also pro-

vides a shipper with the right to file a complaint with the Commission if access to the pipeline is unfairly denied by the pipeline operator. This provision further provides that the Commission may not approve a contract if it would result in a transportation obligation that exceeds the maximum capacity of the pipeline, or if it would result in a destructive competitive practice.

Section 12 of the bill amends section 2(c) of the Mineral Leasing Act. Section 2(c)(1) provides that a common carrier railroad company or any company that controls, is controlled by, or is under common control with such company (a "railroad or affiliated company") may hold leases of coal deposits pursuant to the Mineral Leasing Act subject to specified conditions on (i) lease bidding; (ii) lease holdings; and (iii) transportation of leased coal.

Section 2(c)(2)(A) provides that no railroad or affiliated company is eligible to bid for a lease for coal deposits that are adjacent to coal deposits which: (i) are in lands granted by the United States to such railroad or affiliated company or to a corporate predecessor thereof; and (ii) are owned by such company unless such company notifies the Secretary of its intention to bid. The Secretary shall identify a potential mining unit containing the federal lease and shall require as conditions to the right of the railroad or affiliated company to bid that, prior to the sale, the railroad or affiliated company shall—

(i) upon request, make available at reasonable cost to any potential bidder for the federal lease any and all exploration data in the possession of the company concerning the extent and nature of the land-grant coal deposits when the potential mining unit; and

(ii) agree that, if not the successful bidder for the federal lease, it will offer for lease the land-grant coal deposits owned by the company in the potential mining unit on reasonable terms which are not more stringent than the lease terms (including royalty rate) required by law or regulation for federal leases and which are mutually agreed to by the Secretary and the company.

The remaining provisions of the section are self-explanatory.

Section 2(c)(2)(B) provides that a railroad or affiliated company may bid upon the federal lease without fulfilling such conditions where the coal deposits to be included in the federal lease—

(i) would be bypassed by or are required to maintain ongoing mining operations owned in whole or in part by the railroad or affiliated company and are located in the potential mining unit; or

(ii) are within or adjacent to the permit area of a mining operation that is owned in whole or in part by the railroad or affiliated company and that is operating, and has coal committed to a purchase, prior to the date of enactment of this subsection.

Section 2(c)(3) sets forth requirements relating to acreage limitation. The provisions are self-explanatory.

Section 2(c)(4)(A) provides that whenever a railroad or affiliated company obtains a lease under the Mineral Leasing Act of coal deposits situated within the exclusive service area of such railroad company, the railroad company may not thereafter enter into a

contract to transport coal produced from said lease or from a mining unit that includes said lease ("the Contract") except as specified.

Section 2(c)(4)(B) sets forth requirements relating to submission of the Contract and other specified documents to the Secretary of the Interior. The provisions of the section are self-explanatory.

Section 2(c)(4)(C) provides that any coal producer may file a complaint with the Secretary alleging that the Contract is in violation of law and that it prevented the complainant from selling its coal to the purchaser in lieu of the coal to be transported pursuant to the Contract. If the Secretary determines that (i) the purchaser requested and received a timely and repsonsive supply bid from the complainant, the terms of which were substantially similar to those of the supply contract, (ii) the complainant had no reasonable alternative transportation available for its coal except that supplied in whole or in part by the railroad company, (iii) the purchaser requested a bid from the railroad company to transport in whole or in part the complainant's coal, and (iv) the Contract and the bids, if any, submitted by the railroad company to transport the complainant's coal are not identical in all material respects, the Secretary shall disclose the submissions of the railroad or affiliated company to the complainant and the submissions of the complainant to the railroad company (and to its affiliated company, if the latter holds the lease to the coal to be transported pursuant to the Contract).

The remaining provisions of the section are self-explanatory.

Section 2(c)(4)(D) is self-explanatory.

Section 2(c)(4)(E) is self-explanatory.

Section 2(c)(5) provides that in the case of a rail carrier contract for the transportation of coal mined in whole or in part from a coal deposit that is (a) under lease pursuant to this subsection to the railroad company operating such rail carrier or to an affiliated company and (b) situated within the rail carrier's exclusive service area, a complaint may be filed with the Interstate Commerce Commission by a coal producer or coal shipper on the grounds that such producer or shipper individually will be harmed because—

> (i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such producer or shipper for rates and services for the transportation of coal under similar conditions to the contract at issue, and that the producer or shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or
>
> (ii) the proposed contract constitutes a destructive competitive practice under the Interstate Commerce Act. Such complaint shall be treated as a complaint of unreasonable discrimination under Section 10713(d)(2)(B) of the Interstate Commerce Act.

Section 13 of the bill provides that section 27(k) of the Mineral Leasing Act applies to any holder of a federal coal lease including, but not limited to, a railroad or affiliated company as defined in section 2(c)(1) of the Mineral Leasing Act as amended by this Act.

## VIII. Cost and Budgetary Considerations

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

OFFICIAL COMMITTEE FILE
PLEASE RETURN

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

April 21, 1988

SENATE COMMITTEE ON
ENERGY AND NATURAL RESOURCES
RECEIVED
APR 22 1988
WASHINGTON, D.C. 20510

Honorable J. Bennett Johnston, Jr.
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Congressional Budget Office has reviewed S. 801, the Coal Distribution and Utilization Act of 1987, as ordered reported by the Senate Committee on Energy and Natural Resources, April 13, 1988.

CBO estimates that enactment of S. 801 would not result in a significant impact on the federal budget. Enactment would increase administrative costs, but most of these costs would be covered by fees authorized in the bill.

The bill would facilitate the interstate distribution of coal by pipeline. Specifically, S. 801 would establish procedures for granting the federal power of eminent domain to coal pipeline systems that the government determines are in the national interest.

After securing approval for use of water under state laws, anyone proposing to construct an interstate coal pipeline system could apply for rights-of-way through private land. The federal government would review an application for such rights using the following procedures:

- The Secretary of Energy would review the application to determine whether constructing the proposed system is in the national interest.
- The Attorney General would determine whether the proposed system would violate antitrust laws.
- The Administrator of the Environmental Protection Agency (EPA) would determine whether the water discharged from the proposed system would meet federal requirements.

- The Secretary of the Interior would evaluate the effects of the proposed system on federal mineral interests, establish terms and conditions to minimize the impact on mining leases, and estimate the fair market value of any coal that would not be recovered if the proposed system is built. Applicants would have to pay the government the estimated value of any forgone coal production.

The bill would establish certain requirements for building and operating any coal pipeline system. The bill would also amend the Mineral Leasing Act to allow railroad companies to bid for and hold federal coal leases under certain conditions.

The annual cost of processing pipeline applications would vary with the number of applications received. CBO estimates that very few applications would be received in any one year. Reviews by the Secretary of Energy, the Attorney General, and the Administrator of EPA would cost $200,000 to $300,000 per application. The Department of Energy's costs would be offset by fees authorized in the bill.

Appraising federal land within a proposed pipeline route would cost $125,000 to $150,000 per pipeline. These Department of Interior costs could be offset by payments to the government for the fair market value of forgone coal production. CBO cannot estimate such payments because they would depend on the proposed routes.

The bill would not have any significant effect on the budgets of state and local governments. Administrative costs for some states could increase to handle requests from pipeline applicants for water use approval.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James L. Blum
Acting Director

cc: Honorable James A. McClure
Ranking Minority Member

## IX. Regulatory Impact Evaluation

The bill is not a regulatory measure in the sense of imposing Government established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little if any additional paperwork would result from the enactment of S. 801.

## X. Executive Communications

The pertinent legislative reports and communications received by the Committee setting forth Executive agency recommendations relating to S. 801 are set forth below:

**Department of Energy**
Washington, DC 20585

April 12, 1988

Honorable J. Bennett Johnston
Chairman
Committee on Energy and
Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your request for the views of the Department of Energy on S. 801, the "Coal Distribution and Utilization Act of 1987".

The purpose of the bill is to facilitate the development of interstate coal pipeline distribution systems (commonly known as coal slurry pipelines) by granting the Federal power of eminent domain to those systems determined by the Secretary of Energy to be in the national interest. Development of these systems would remain subject to state water laws, interstate compacts, and laws governing the interstate allocation of water.

In making the national interest determination, the Secretary would consider the extent to which the system would meet national coal distribution and utilization needs, enhance competition, provide new market outlets for coal, contribute to national security by expanding the market for domestic coal, reduce coal transportation costs or electricity rates, enhance the reliability of both coal and electricity supplies, and have an environmental impact compared to other coal transportation and coal-use alternatives.

Before a determination of national interest could be made, all affected states and several Federal agencies would provide substantial input. The Department of Justice must find that a pipeline system would conform to antitrust laws and the Environmental Protection Agency must find that a system would conform with Federal water discharge laws before the Secretary can make the national interest determination. The Department of the Interior would have the authority to protect the Federal interest if a pipeline system crosses coal-bearing lands in which the United States has an interest. Once constructed, an interstate coal pipeline system would be regulated by the Federal

Energy Regulatory Commission under mandatory contract carriage.

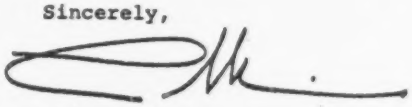
In this type of regulatory system, coal transport would be provided through voluntary, negotiated contracts between pipeline operators and shippers, but the pipeline operator would be required to accept all qualified shippers until pipeline capacity is fully allocated. A portion of pipeline capacity would be made available for small and independent coal producers.

In the recent review of energy security issues by the Department, it was concluded that: "The national interest can be served by government actions to encourage the construction of coal slurry pipelines in a way that adequately protects the water rights of the individual States." (Cf. Energy Security: A Report to the President of the United States, page 178).

S. 801 provides this protection by explicitly stating that State water laws retain primacy over the provisions of this Act. The bill also establishes a balanced and reasonable procedure for determining whether the exercise of Federal eminent domain would benefit the national interest. These two provisions are essential elements in a coal slurry pipeline bill in order for the proper Federal-State relationship to be maintained. In addition, the bill provides no subsidies for the construction or operation of coal pipelines systems, assuring that they will be built based on sound economic considerations. For these reasons, the Department of Energy does not object to the enactment of S. 801.

The Office of Management and Budget has advised that, from the standpoint of the President's program, there is no objection to presentation of this report for consideration of the Committee.

Sincerely,



Eric J. Fygi
Acting General Counsel

cc: Honorable James A. McClure
Ranking Minority Member

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable J. Bennett Johnston
Chairman
Committee on Energy and
Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter sets forth the views of the Department of Justice ("Department") on S. 801, the "Coal Distribution and Utilization Act of 1987." The bill's purpose is to establish adequate interstate and foreign transportation for the efficient and economic distribution of coal, without impinging on state water law, interstate compacts, or laws governing the interstate allocation of water. The Department of Justice generally supports this legislation because it will facilitate the development of interstate coal pipeline distribution systems ("coal slurry pipelines"), which may be an efficient and cost-justified way to transport coal and, therefore, would contribute to competition in energy development and transportation.

The Legislation

The bill provides for granting a federal power of eminent domain for the construction of coal slurry pipelines that are determined to be in the national interest under standards enunciated in the bill. Section 4(a) of the bill provides that any person who has secured appropriate water rights authority under state water law may apply to construct an interstate coal pipeline distribution system. The Secretary of Energy is to determine "whether the construction of such system is in the national interest." Section 4(b) provides that in making his determination, the Secretary must make findings as to the extent to which the system (1) meets national needs for coal distribution; (2) enhances competition; (3) contributes to the national security; (4) results in economic benefits including reduced coal transportation costs, reduced electric rates, and

enhanced supply reliability; and affects the environment as compared with alternatives. 1/

Section 4(e) provides that the Attorney General shall conduct an antitrust review to determine the likely effects on competition of approval of the application. The Attorney General must report the results of that review, including recommendations of terms and conditions necessary to protect competition, to the Secretary within 120 days. No application may be determined to be in the national interest if the Attorney General advises that approval would not be consistent with the antitrust laws.

Section 4(f) provides that if construction of the proposed interstate coal distribution system is found to be in the national interest, the person proposing to build the pipeline may, after good-faith efforts to acquire necessary rights-of-way by negotiating with private landowners, exercise the power of eminent domain to acquire the rights-of-way over private lands in U.S. District Court or in the appropriate state court under state eminent domain law. No water rights may be acquired through eminent domain, and the bill expressly preserves the applicability of state water law with respect to water rights issues, including the states' rights to regulate the use or export of water in interstate coal pipeline distribution systems. Section 5(c) specifically provides that the legislation would not preempt any provisions of state water law, any interstate water compact, or any Indian water rights. Sections 6 and 8 of the bill preserve the rights of the states to non-discriminatory regulation of the location, construction, operation, or maintenance of a pipeline, and the rate-making authority of any state utility regulatory agency or the Federal

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1/ Section 4(c) of the bill requires that the applicant make available to small and independent coal producers the lesser of 10 percent of pipeline capacity or whatever capacity is necessary to satisfy their demand in the pipeline's geographic region. "Small and independent coal producer" is defined as a producer of less than 200,000 tons of coal in the year prior to application and that is not affiliated with another company. Section 4(d) provides procedures that must be followed in making a national interest determination, including notice and opportunity for presentation of views or arguments, and hearings at the discretion of the Secretary. A final decision must be made within eighteen months from receipt of the application, except that the Secretary may extend the period for ninety days for good cause.

Energy Regulatory Commission (FERC) with respect to costs related to construction, operation, and maintenance of any pipeline system.

Section 11 provides that a pipeline may enter into contracts with coal shippers and must file such contracts with FERC. The pipeline may not "unreasonably discriminate" by refusing to enter into similar contracts with other shippers who seek service between the same points. The bill contains other provisions regulating the nature and performance of such contracts, and FERC is empowered to order pipelines to provide service upon finding that such mandatory provisions have been violated.

Discussion

Desirability of and Need for Federal Eminent Domain Legislation

Federal eminent domain legislation for coal slurry pipelines would facilitate development of such pipelines and thereby provide increased capability and competition for the transportation of coal. Without enabling legislation, such pipelines may never be built since states through which the pipelines pass, but which neither produce nor consume significant quantities of coal that would be shipped by pipeline, may have no incentive to grant state eminent domain authority. Ample precedent exists for granting a federal right to a system transporting an energy commodity when it is in the national interest. Historically, the railroads were given many of their rights of way and much more land as an outright grant; they now have state eminent domain authority. Natural gas pipelines have the federal right of eminent domain. 15 U.S.C. § 717f. Thus, federal eminent domain is necessary to put coal slurry pipelines on a nearly equal footing with their transportation competitors.

Federalism Issues

While federal eminent domain legislation for coal slurry pipelines raises important issues of federalism related to state water rights, we believe that this legislation adequately would protect the states' water rights and would preserve their rights in eminent domain actions. Sections 5, 6, and 8 of the bill, in particular, appear appropriately to limit the scope of the federal role with respect to coal slurry pipelines.

One ambiguity in section 5(b) of the bill that if interpreted incorrectly could be unconstitutional in that it

could give the states power that they do not have under the Constitution, can easily be remedied by a small change in the bill's language. Congress may, of course, enact legislation that acknowledges state laws that might otherwise be argued to be an unconstitutional burden on interstate commerce. See, e.g., New England Power Co. v. New Hampshire, 455 U.S. 1096, 1102-03 (1982). We believe this to be the intent of section 5(b) of the bill. To make clear that this section is referring to state laws and regulations governing use of water within a state, however, the language of section 5(b) should specify that the delegation grants to "each of the States the power to regulate the use or export of water within each such State in interstate coal pipeline distribution systems, through State water laws, notwithstanding any adverse impact such delegation may have on interstate commerce or any interstate coal pipeline distribution system." This language would make clear that no State has the power to regulate water or coal slurry pipelines outside of its borders.

Antitrust Review

The Department of Justice appreciates the bill's attempts to deal with competitive concerns that may arise in the construction, operation and maintenance of coal slurry pipelines. We recommend certain revisions in section 4(e) of the bill to ensure that these provisions effectively prevent competitive harm while conforming our role and the operation of these provisions to analogous provisions in other energy-related statutes.

First, the language of section 4(e) should utilize the standard for antitrust review contained in other statutes, such as the Federal Coal Leasing Act Amendments Act of 1976, which requires advice as to whether granting an application "would create or maintain a situation inconsistent with the antitrust laws." The Department has had considerable experience with this standard, which closely approximates the standard for reviewing mergers and acquisitions under section 7 of the Clayton Act. This experience, along with court precedents that interpret section 7 in merger cases, should help facilitate interpretation of revised section 4(e) and its application to particular situations.

Second, section 4(e) provides that the Secretary of Energy--the person charged with determining whether each application for federal eminent domain authority is in the overall public interest--is precluded from granting an application if he is advised by the Attorney General that the grant of a particular application would have adverse competitive effects. Competitive concerns, while important,

should not in all cases outweigh other factors required to be taken into consideration by the Secretary in making his determination. Thus, we recommend that the Secretary be permitted to approve an application or refuse to impose recommended terms or conditions, even where he receives adverse competitive advice from the Attorney General. In such instances, he should be required to make specific findings that approval of the application is necessary to carry out the purposes of the Act and that there are no reasonably available alternatives that would have significantly less anticompetitive effects. This recommended approach is analogous to the antitrust review and approval process for coal lease sales contained in the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 184 (1)2. 2/

Third, the bill contains no express mechanism for ensuring effective redress of competitive problems that could arise after the right of eminent domain has been granted. We therefore also recommend that a new section be added such as that contained in the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 184 (1)(2)(3) to clarify that the approval does not impart any implied immunity for subsequent anticompetitive actions and that the antitrust laws remain fully applicable to the acts of the pipeline owners.

Fourth, we also suggest that the period of time within which the Attorney General shall conduct the review and submit his report and recommendations be extended to 180 days from the date of notification by the Secretary. This approach also conforms to comparable law and should help ensure complete and proper analysis of all competitive issues. Of course, nothing would preclude completion of this task in a shorter time when that is possible.

Fifth, we recommend that section 4(e)(2)(B) be revised to state that an "antitrust review shall be deemed an antitrust investigation for purposes of the Antitrust Civil Process Act (15 U.S.C. § 1311)." Again, this provision will ensure the Department's ability to obtain information necessary to our analysis through process normally employed in civil investigations, and also in conformity with other reporting obligations. We enclose a revised section 4(e) that would effectuate these recommended changes.

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2/ See also, Lease Sales 43 C.F.R. § 3422.3-4 (1987).

Need for Further Study of Rate Regulation and Ownership Restrictions

The bill contemplates that coal slurry pipelines be permitted to enter into contracts for transportation of coal slurry, and gives FERC responsibility over these contracts. The bill suggests that FERC has ratemaking authority: 3/ current law, however, places this ratemaking authority with the ICC. 49 U.S.C. § 10501. We suggest that these regulatory matters should be clarified and thoroughly analyzed as to their justification, necessity and the most appropriate regulatory mechanism to implement them.

Relationship to the Surface Mining control and Reclamation Act

We also note that clarification by Congress may be necessary with respect to the relationship of this bill to the Surface Mining Control and Reclamation Act (SMCRA). First, is a coal slurry pipeline a coal prepartation facility within the meaning of section 701(28) of SMCRA, 30 U.S.C. § 1291(28)? Second, who would have jurisdiction over the coal slurry pipeline for SMCRA purposes?

Conclusion

If the Department's suggested revisions are adopted, and if the remaining issues can be resolved such that they no longer pose a risk to competition, the Department of Justice would support this legislation.

The Office of Management and Budget has advised this Department that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

Enclosure

cc: Dale Bumpers
Ranking Minority Member

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3/ Section 8 states that nothing in the Act shall be contrued to "preempt the ratemaking authority of . . . the F.E.R.C."

S. 801

Sec. 4.

(e) ANTITRUST REVIEW.--(1) Not later than ten days after any application for a determination under this section is received by the Secretary, the Secretary shall notify the Attorney General of the filing of such application and shall provide the Attorney General with a copy of such application and such other information as the Attorney General may request. The Attorney General shall conduct an antitrust review to determine whether [the likely effects upon competition of] approval of such application would create or maintain a situation inconsistent with the antitrust laws, and not later than one hundred and [twenty] eighty days after the date of receipt of such notification shall advise the Secretary of the results of such review, including, but not limited to, findings, and recommendations concerning such terms and conditions as the Attorney General deems necessary to protect and promote competition. [No application may be determined to be in the national interest under this section i]If the Attorney General advises the Secretary in writing that, on the basis of such review, approval of such application is not consistent with the antitrust laws[.], no application may be determined to be in the national interest under this section unless the Secretary makes specific findings that such determination is necessary to effectuate the purposes of the Act, and that there are no reasonable alternatives consistent with the Act, the national interest, and the antitrust laws. If terms and conditions recommended by the Attorney General to protect and promote competition are not adopted, the Secretary shall state the reasons for their omission.

(2) Nothing in this chapter shall be deemed to convey to any person, association, corporation, or other business organization immunity from civil or criminal liability, or to create defenses to actions, under any antitrust law.

(3) For the purpose of paragraph (1), [the terms--]

(A) "antitrust laws" has the meaning such term has under section 1 of the Clayton Act (15 U.S.C. 12; and

(B) "antitrust review" [has the meaning the term] shall be deemed an "antitrust investigation" [has] for purposes of the Antitrust Civil Process Act (15 U.S.C. 1311).

## SUPPLEMENTAL VIEWS OF SENATOR HECHT

Coal currently accounts for about one fourth of all energy consumed in the United States, and produces about 60 per cent of our nation's electricity. These percentages shall and must increase over time.

Coal is America's energy ace in the hole. We have vast amounts of this material, and we would be very foolish not to make full use of it. We need to be able to economically mine coal, transport it at reasonable costs using as wide a variety of modes of transportation as possible, and burn it as efficiently and cleanly as possible.

Given the current world energy situations, and the fact that the United States is heavily dependent on imports for its supply of both petroleum and uranium, we have no choice whether or not to burn more coal. Coal necessarly looms large in America's energy future. With or without coal slurry legislation, I am absolutely certain that our railroads will be moving more and more coal from one year to the next. We must burn more coal, and we had better take as many steps as possible, as soon as possible, to ensure that the coal will be available at reasonable costs when and where we will need it.

I believe this legislation is a step in the right direction. It allows coal slurry pipelines to become a viable alternative means of transporting coal, and an environmentally benign mode of transport. The legislation, as amended, also allows for more efficient development of coal reserves owned by railroads or their mining affiliates. I am mindful of the fact that deregulation does not always lead to more competition and better value for the consuming public. It is possible for it to lead to increased monopoly power. However, I do believe that we are generally well-advised to at least give deregulation a chance. I am very sensitive to the concerns of the coal companies on this matter, and will closely monitor how any amendment of Subsection 2(c) of the Mineral Leasing Act affects the ability of all coal companies to move their product at reasonable rates.

Probably the greatest challenge facing the necessary further reliance of the American economy on domestic coal reserves is the issue of air pollution, particularly acid rain. In this vein, I support efforts to develop clean coal technologies. I think it makes a lot more sense to burn coal cleanly in the first place than to try to clean up dirty coal as its effluent moves up the smokestacks.

CHIC HECHT.

## XI. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 801, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

### Mineral Leasing Act

(Section 2(c) 41 Stat. 438, as amended)

* * * * * * *

Sec. 2. (c) [No company or corporation operating a common-carrier railroad shall be given or hold a permit or lease under the provisions of this chapter for any coal deposits except for its own use for railroad purposes; and such limitations of use shall be expressed in all permits and leases issued to such companies or corporations; and no such company or corporation shall receive or hold under permit or lease more than ten thousand two hundred and forty acres in the aggregate nor more than one permit or lease for each two hundred miles of its railroad lines served or to be served from such coal deposits exclusive of spurs or switches and exclusive of branch lines built to connect the leased coal with the railroad, and also exclusive of parts of the railroad operated mainly by power produced otherwise than by steam.

Nothing in this section and section 201 of this title shall preclude such a railroad of less than two hundred miles in length from securing one permit or lease thereunder but no railroad shall hold a permit or lease for lands in any State in which it does not operate main or branch lines.]

*(1) A common carrier railroad company or any company that controls, is controlled by, or is under common control with such company (hereinafter in this subsection referred to as a "railroad or affiliated company") may hold leases of coal deposits pursuant to this Act subject to the special conditions on (i) lease bidding in paragraph (2); (ii) lease holdings in paragraph (3); and (iii) transportation of leased coal in paragraph (4).*

*(2)(A) No railroad or affiliated company shall be eligible to bid for a lease under this Act of coal deposits that are adjacent to coal deposits which (i) are in lands granted by the United States to such railroad or affiliated company or to a corporate predecessor thereof and (ii) are owned by such company (hereinafter in this paragraph referred to as "the Federal lease") unless such company notifies the Secretary of its intention to bid by a date, established by regulation, prior to the sale of the Federal lease. Whenever such a notification has been received and a tract for the Federal lease has been delin-*

*eated, the Secretary shall identify a potential mining unit containing the Federal lease (hereinafter in this paragraph referred to as "the potential mining unit") and shall require as conditions to the right of the railroad or affiliate company to bid when and if the Federal lease is offered for sale, that, prior to the sale, the railroad or affiliated company shall—*

*(i) upon request, make available at reasonable cost to any potential bidder for the Federal lease any and all exploration data in the possession of the company concerning the extent and nature of the land-grant coal deposits within the potential mining unit; and*

*(ii) agree that, if not the successful bidder for the Federal lease, it will offer for lease the land-grant coal deposits owned by the company in the potential mining unit on reasonable terms which are not more stringent than the lease terms (including royalty rate) required by law or regulation for Federal leases and which are mutually agreed to by the Secretary and the company: Provided, That whenever the Secretary identifies the potential mining unit pursuant to this subparagraph (A), he shall promptly enter into good faith negotiations with the railroad or affiliated company to establish such terms and shall not offer the Federal lease until such terms are established or he and the company mutually agree in writing that the negotiations have concluded and no agreement on terms can be reached; in which latter event, the railroad or affiliated company shall not be eligible to bid on the Federal lease: Provided further, That the Secretary may determine without company concurrence that no agreement on terms can be reached if, after publishing a complete statement of his final offer to the company in the Federal Register and allowing thirty days for a response, the company has failed to agree to such terms.*

*(B) After notification to the Secretary pursuant to subparagraph (A), a railroad or affiliated company may bid upon the Federal lease without the conditions specified in said subparagraph where the coal deposits to be included in the Federal lease—*

*(i) would be bypassed by or are required to maintain ongoing mining operations owned in whole or in part by the railroad or affiliated company and are located in the potential mining unit; or*

*(ii) are within or adjacent to the permit area of a mining operation that is owned in whole or in part by the railroad or affiliated company and that is operating, and has coal committed to a purchase, prior to the date of enactment of this subsection.*

*(3) Any railroad or affiliated company shall be subject to the acreage restrictions of section 27(a)(1) of this Act and, within these limitations, shall not take, hold, or control at one time, whether acquired directly from the Secretary or otherwise under this Act, lease of coal deposits adjacent to land-grant coal deposits which were granted by the United States to such railroad or affiliated company or to a corporate predecessor thereof and are owned by such company in an aggregate of more than twenty-three thousand and forty acres.*

*(4)(A) Whenever a railroad or affiliated company obtains a lease under this Act of coal deposits situated within the exclusive service*

*area of such railroad company, the railroad company may not thereafter enter into a contract to transport coal produced from said lease or from a mining unit that includes said lease (hereinafter in this paragraph referred to as "the Contract") except as provided in this paragraph.*

*(B) In addition to any filing which may be required by any other provision of law, the railroad company shall submit the Contract to the Secretary, together with copies of any formal transportation bid notice or request from the purchaser of the coal to be transported pursuant to the Contract (hereinafter in this paragraph referred to as "the purchaser") to which the railroad company responded and all formal transportation bids submitted by the railroad company in response to such notice or request. The railroad or affiliated company shall also submit to the Secretary its supply contract with the purchaser. Within five days of submission of the Contract, the Secretary shall publish in the Federal Register notice of such submission, including identification of the contracting parties, the affected lease, and the lessee. The Contract shall not become effective until thirty days after the date of such publication.*

*(C) Within that same thirty-day period, any coal producer (hereinafter in this paragraph referred to as "the complainant") may file a complaint with the Secretary alleging that the Contract is in violation of law and that it prevented complainant from selling its coal to the purchaser in lieu of the coal to be transported pursuant to the Contract. The complainant shall submit with its complaint a copy of its coal supply bid to the purchaser and any other information necessary for the Secretary to make the disclosure determination provided for in this subparagraph. If the Secretary determines that (i) the purchaser requested and received a timely and responsive supply bid from the complainant, the terms of which were substantially similar to those of the supply contract, (ii) the complainant had no reasonable alternative transportation available for its coal except that supplied in whole or in part by the railroad company, (iii) the purchaser requested a bid from the railroad company to transport in whole or in part the complainant's coal, and (iv) the Contract and the bids, if any, submitted by the railroad company to transport the complainant's coal are not identical in all material respects, the Secretary shall disclose the submissions of the railroad or affiliated company to the complainant and the submissions of the complainant to the railroad company (and to its affiliated company, if the latter holds the lease to the coal to be transported pursuant to the Contract).*

*(D) The submissions to the Secretary pursuant to this paragraph shall be disclosed by him only pursuant to subparagraph (C) and, except as provided in subparagraph (E), shall otherwise remain proprietary and not be released to any other person or entity, any other provision of law notwithstanding.*

*(E) The complainant may make use of the submissions of the railroad or affiliated company solely for the purpose of determining whether a cause of action may exist against the railroad or affiliated company may make use of and disclose the submissions of the complainant solely for the purpose of defending such cause of action. No other disclosure or use may be made of such submissions.*

*(5) In the case of a rail carrier contract for the transportation of coal mined in whole or in part from a coal deposit that is (a) under lease pursuant to this subsection to the railroad company operating such rail carrier or to an affiliated company and (b) situated within the rail carrier's exclusive service area, a complain may be filed with the Interstate Commerce Commission by a coal producer or coal shipper on the grounds that such producer or shipper individually will be harmed because—*

*(i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such producer or shipper for rates and services for the transportation of coal under similar conditions to the contract at issue, and that the producer or shipper was ready, wiliing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or*

*(ii) the proposed contract constitutes a destructive competitive practice under the Interstate Commerce Act.*

*Such complainant shall be treated as a complaint of unreasonable discrimination under Section 10713(d)(2)(B) of the Interstate Commerce Act (49 U.S.C. 10713(d)(2)(B)).*

# APPENDIX A

Excerpt from S. Rep. No. 98-61, 98th Cong., 1st Sess. (1983), Accompanying S. 267

## 20

### GENERAL DISCUSSION

The Committee amendment reflects the essential compromise struck by the Committee in its consideration of Federal assistance for "national interest" pipelines.

In effect, the Committee has reported substitute legislation which has two purposes: (1) access to Federal eminent domain powers for "national interest" pipelines; and (2) the absolute primacy of State water law applicable to all interstate coal pipeline distribution systems. This duality of purpose reflects the Committee's conclusion that the limited Federal assistance for certain coal slurry pipelines (i.e., access to Federal eminent domain powers) should only be provided in Federal legislation which also establishes beyond question the greater national interest in the primacy of State water law. The Federal purpose, then, expressed in the reported Committee amendment, incorporates these different inextricably linked purposes without which the bill could not and would not have been favorably reported. Stated another way, the Committee intends that the eminent domain provisions of this Act be narrowly construed. The Committee does not intend these provisions to be construed as an "intention of Congress to secure a comprehensive development of national resources . . ." as was found in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152 (1946). There is no intent to generally legislate in this field, but rather, the intent is to grant a well-defined and specifically limited authority for the potential use of the power of eminent domain by private parties constructing coal slurry pipelines subject to the primacy of State water law. By contrast, the provisions related to State water law are expressly intended by the Committee to be a broad delegation of power, and to be so construed. The Committee recognizes that this policy may result in a nonuniform set of laws governing the availability or use of water in coal slurry pipelines, but concludes that the greater national interest resides in protecting and maintaining the primacy of State water law, including interstate compacts regarding the allocation of water.

The Committee adopted this policy after receiving expert testimony on both water and Constitutional law. It conducted a careful review and analysis of both longstanding Congressional policy regarding the sanctity of State water law, and the judicial interpretations of relevant State and Federal statutes, including the most recent decisions by the U.S. Supreme Court in *New England Power Co.* v. *New Hampshire* —— U.S. ——, 102 S. Ct. 1096, (1982) and *Sporhase* v. *Nebraska*, —— U.S. ——, 102 S. Ct. 3456 (1982).

Beginning with the Act of July 26, 1866 (14 Stat. 251), Congress expressly confirmed water rights acquired in accordance with State law in numerous statutes which have been the subject of equally numerous judicial interpretations. Generally, in examining the validity of a particular State law or action against a particular Federal statute including water provisions, the Courts have sought to define the extent to which Congress has clearly expressed the relationship of the provisions to powers under the Commerce Clause (Article I § 8, Clause 3 of the U.S. Constitution), the Supremacy Clause (Article VI, Clause 2 of the U.S. Constitution), and the intended purpose of the statute as a whole.

Under the Commerce Clause of the Constitution, Congress has plenary power to regulate interstate commerce. It is empowered to determine whether the interests of the nation are better served by uniform Federal regulation, or by nonuniform or more restrictive State control. Where the Constitution grants to Congress the power to legislate, it may discharge its legislative function by adopting State laws, present or prospective. *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946). It may also remove the obstacles to State legislation which will permit the State itself to legislate directly on the subject. *Butte City Water Co.* v. *Baker*, 196 U.S. 119 (1905); *In re Rahrer*, 140 U.S. 545 (1891). Moreover, the United States Supreme Court has recently reconfirmed that Congress may "confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). This is true notwithstanding the fact that the Commerce Clause contains an implied limitation on the power of the States to burden interstate commerce. *See Cooley* v. *Board of Wardens*, 53 U.S. 299 (1852). For, "if Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the Congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 652-3 (1981). Also see *New England Power Co.* v. *New Hampshire*, —— U.S. ——, 102 S. Ct. 1096 (1982).

As Chief Justice Stone stated in *Southern Pacific Co.* v. *Arizona* (325 U.S. 761, 766-7 (1948),

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the States to regulate the commerce in a manner which would otherwise not be permissible, or exclude State regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce. (Citations omitted)

More recently, in the *New England Power Co.* case, Chief Justice Burger pointed out in the unanimous opinion of the Court,

> It is indeed well settled that Congress may use its powers under the Commerce Clause to confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. The dispositive question, however, is whether Congress in fact has author-

ized the States to impose restrictions of the sort at issue here. (Slip opinion, p. 8; citations omitted)

Moreover, in summarizing the history of Congressional enactments regarding State water law and judicial interpretations regarding State water law and judicial interpretations in *Sporhase*, Justice Stevens stated,

> Although the 37 statutes and the interstate compacts demonstrate Congress' deference of State water law, they do not indicate that Congress wished to remove Federal constitutional constraints on such State laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the valid State law to which Congress has deferred. Neither the fact that Congress has chosen not to create a Federal water law to govern water rights involved in Federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "intent and policy to sustain State legislation from attack under the Commerce Clause" was "expressly stated". (Slip opinion, pp. 17-18; citations omitted)

The Committee intends that the language of the Committee amendment in Sections 2(a)(7), 2(a)(8), 2(a)(9), 2(b), 4(a)(1), 4(e)(2), 4(e)(3), and 5 constitutes a clear and "expressly stated" "intent and policy" as stated by Justice Stevens in *Sporhase*, giving the consent of Congress under the Commerce Clause, necessary to allow the States to regulate commerce through the application of State water laws to interstate coal pipeline distribution systems in a manner which could be otherwise impermissible. The Committee in the words of Chief Justice Burger in *New England Power Co.* "in fact has authorized the States to impose restrictions" on commerce. It is the unequivaocal intent of this bill to establish the primacy of State water law by authorizing the States to impose restrictions on interstate coal pipeline distribution system which conceivably might otherwise be argued unilateral impositions of unreasonable burdens on commerce absent this legislation and to sustain such "State legislation from attack under the Commerce Clause". If a State has granted the necessary water rights under State law for operations to begin for a "national interest" pipeline, or any other interstate pipeline, and then subsequent State action pursuant to applicable State law, alters, restricts, or terminates the operations of the pipeline, this legislation would ensure that such State action would be constitutionally valid. The fact that coal slurry operations in interstate commerce would have begun would not diminish the primary or applicability of State water law to such an interstate coal pipeline distribution system. The continued application and primacy of State water law through any subsequent State action after construction and initial operation of the pipeline cannot be interpreted to be an unreasonable burden on interstate commerce.

This legislation ensures that State water law shall control for the duration of the pipeline operations and shall not be subject to any preemption by application of the Commerce Clause.

In the *Sporhase* case, which concerned the application of a Nebraska statute banning the export of groundwater to another State unless that State has a law granting reciprocal rights to export water into Nebraska, the Court applied a traditional Commerce Clause analysis, involving a balancing between legitimate State interest and its burden on commerce. Utilizing this approach, the Court found that portion of the Nebraska statute requiring reciprocity to be an unconstitutional burden on interstate commerce. In a more recent case, *El Paso* v. *Reynolds,* Civ. No. 80-730 HB (D.N.M. Jan. 17, 1983, the United States District Court for the District of New Mexico, following the holding and analytical approach of *Sporhase,* found a New Mexico statute containing an outright prohibition against the transportation of water from New Mexico to another State to be unconstitutional. The Committee intends that the continued application and vitality of State water law applicable to interstate coal pipeline distribution systems shall not be dependent upon any such Constitutional analysis of the legitimacy of the interests the State is seeking to protect as related to the reasonableness of any burden on interstate commerce which may be imposed by State water law. The Committee has affirmatively considered such Constitutional questions, and by the provisions of the Committee amendment has expressly disposed of them in favor of State water law. In so doing, the Congress will have also, as discussed previously, concluded that existing as well as future State water law applicable to interstate coal pipeline distribution systems shall come under the primacy provisions of this law. Consequently, new State water law statutes or amendments to existing statutes which are applicable to interstate coal pipeline distribution systems, shall be considered to have such primacy under the legislation.

The Committee appreciates that some case law, such as *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152 (1946) has been argued to stand for the legal proposition that Congress has been unsuccessful in laws such as the Federal Power Act in preserving State water law through the statutory provision of savings clauses. The Congressional intent and primary legal theory here is diametrically opposed to any such arguments and analyses. Here, regardless of the body of scholarly legal opinion on the state of existing law in the general issue of State water law under the Constitution, Congress will have enacted pursuant to its Commerce Clause powers, Federal legislation to ensure an express and absolute protection and primacy of State water law for all interstate coal pipeline distribution systems, not merely a legislative "saving" of such laws.

An important element of the Committee amendment's approach to water law is the recognition and preservation of interstate compacts governing the appropriation, purchase, transfer, use, export, or diversion of water. Interstate compacts historically has been the legal vehicle ratifying interstate agreements governing water allocation among several States with interests in a source of water. Such interstate compacts are unaffected by this legislation and are

applicable as a part of State water law to all interstate coal pipeline distribution system. The Committee intends that the legal sufficiency and primacy of any Congressionally approved interstate compacts now in existence or subsequently adopted will be unquestioned despite the enactment of this legislation. Therefore, any interstate coal pipeline distribution system, whether determined to be in the national interest or not, will be subject to any applicable interstate compact governing water appropriation, purchase, transfer, use or diversion, and all such pipelines must be in conformance with such interstate compacts. The Committee believes that interstate compacts are appropriate vehicles for States to use to determined allocations of water among themselves, as well as to ensure that their respective water interests are protected during the construction and operation of any coal slurry pipeline affecting such interests. The Committee encourages the several States who have water availability interests in proposed interstate coal pipeline distribution system to consider the establishment of an interstate compact to ensure the protection of their interests, to the extent they have not already done so.

The Committee also is aware that in cases where no interstate compact exists regarding the allocation of water, or where disputes have arisen under compacts, the courts have allocated or apportioned water. The Committee does not intend to affect, preempt, or invalidate such final judicial decisions by this legislation, either currently in effect or decided in the future.

The Committee-reported amendment thus reflects the Committee's conclusions and intentions with regard to interstate coal pipeline distribution system and the applicability of State water law. The Committee does not intend to imply that the scheme it has adopted here to establish the primacy of State water law is the only one which Congress might adopt to accomplish the same end. The Committee notes in that regard that the House Committee on Interior and Insular Affairs and the House Committee on Public Works and Transportation reported similar legislation in the 97th Congress, H.R. 4230, with related provisions and a similar intent expressed in the respective committee reports (H. Rept. 90–423, parts I and II). In the 98th Congress the House Committee on Interior and Insular Affairs has reported H.R. 1010, again with a similar intent and purpose.

Further, the Committee during its consideration of this legislation necessarily took notice of the general state of the law regarding State water law under the Constitution of the United States, whether or not interstate coal pipeline distribution systems were the direct subjects of Federal action under this legislation. The Committee's action in fashioning the several provisions related to State water law applicable to interstate coal pipeline distribution systems is not intended to be any general Congressional statement, expressed or implied, with regard to State water laws or their primacy in our Federal Constitutional scheme of laws. The Committee has not, and does not, take a position on the validity of any individual State water law in any fact situation other than under this legislation. Further, the Committee expressly reserves its position and any subsequent opinion on the broader issues of State water law in existing law and on the conclusion it might reach with regard to

the applicability of State water laws in other arguable interstate commerce situations. Any such positions and opinions of the Committee should not be inferred from the reported Committee amendment nor this discussion. Neither does the Committee intend to create any implication that Congress is expanding any Federal jurisdiction which may exist regarding water.

The Committee amendment also addresses the use of Federal reserved water in interstate coal pipeline distribution systems in Sections 4(f)(3), 5(c)(9), and 5(d), which are patterned on Section 178 of the Energy Security Act, Public Law 96-294, 94 Stat. 611 (June 30, 1980). These sections make it clear that: (1) an interstate coal pipeline distribution system does not become a Federal project by virtue of the eminent domain authority under section 4 for the purpose of applying for or assigning water rights; (2) the Act does not confer upon any non-federal entity the right to the waters of any stream or underground water resources; and (3) any water to which a Federal right can be asserted may be used for interstate coal pipeline distribution systems only if authorized pursuant to State substantive and procedural law. Clearly the Committee does not intend to create any Federal reserved water right by this Act. Moreover, any existing Federal water right must be authorized in conformance with and subject to State water law.